85-716

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1985

JOHNNY VEAL,

Petitioner,

vs.

RICHARD DeROBERTIS, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether The Compulsory Process Clause Of The Sixth Amendment Forbids The Exclusion Of Otherwise Admissible Evidence Solely As A Sanction To Enforce Discovery Rules Or Orders Against Criminal Defendants.

2.

Whether The *Reed* v. *Ross* (1984), 104 S.Ct. 2901 Exception To The *Engle* v. *Isaac* (1982), 456 U.S. 107 Doctrine Prohibits A Federal Court On Habeas From Employing A State Procedural Bar, Which Did Not Exist At The Time Of Petitioner's Trial, In Order To Deny Relief To A Petitioner Claiming A Violation Of The Sixth Amendment Guarantee To Compulsory Process.

TABLE OF CONTENTS

PAGE

Questions Presented i

Prayer 1

Opinions below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 6

Conclusion 9

Appendicies:

A. Opinion and Order of the United States Court of Appeals for the Seventh Circuit dated June 17, 1985 .....App. 1a

B. Order denying Petition for a Rehearing *En Banc*, dated July 31, 1985 .....App. 3a

TABLE OF CASES

PAGE

Engle v. Issac (1982), 456 U.S. 107 ..... 4, 7, 8

Fendler v. Goldsmith (1983), 717 F.2d 1552 as amended 728 F.2d 1181 (1984) 6

Parisie v. Greer (7 Cir., 1983), 705 F.2d 882 8

People v. Fields (1974), 59 Ill.2d 516 ..... 3, 6

People v. Lynch (1984), 104 Ill.2d 194 8

People v. Stinson (1976), 37 Ill.App.3d 229 3

People v. Veal (1978), 58 Ill.App.3d 938, 374 N.E.2d 963 ..... 1, 3

Ronson v. Commissioner of Corrections (1979), 604 F.2d 176 6

Ross v. Reed (1984), 104 S.Ct. 2901 ..... 7, 8

Smith v. Jago (1985), ... U.S. ....., 105 S.Ct. 1777 .. 6

Stallworth v. Detroit Board of Education (1983), ... U.S. ....., 103 S.Ct. 2141 6

United States v. Davis (1978), 603 F.2d 663 6

United States ex rel Hariston (1979), 597 F.2d 604 3

United States ex rel Veal v. DeRobertis (1982), 693 F.2d 642 ..... 2, 4, 7

United States ex rel Veal v. DeRobertis (1984), 586 F.Supp. 19 ..... 2, 4, 8

United States ex rel Veal v. DeRobertis (1985), 767 F.2d 926 ..... 2, 5

United States ex rel Veal v. Wolff (1981), 529 F. Supp. 713 ..... 2, 4, 7

Veal v. Illinois (1979), 441 U.S. 908 3

Wardius v. Oregon (1973), 412 U.S. 470 ..... 3, 6

Williams v. Florida (1970), 399 U.S. 78 6

IN THE

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No.

JOHNNY VEAL,

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vs.

RICHARD DeROBERTIS, Warden,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner, Johnny Veal, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District, affirming Petitioner's conviction appears in *People* v. *Veal* (1978), 58 Ill. App.3d 938, 374 N.E.2d 963. The opinion of the United States District Court, Northern Dis-

trict of Illinois granting Petitioner's Petition for Writ of Habeas Corpus appears in *United States ex rel Veal* v. *Wolff* (1981), 529 F.Supp. 713. The opinion of the United States Court of Appeals for the Seventh Circuit reversing and remanding for an evidentiary hearing appears in *United States ex rel Veal* v. *DeRobertis* (1982), 693 F.2d 642. The opinion of the United States District Court denying the Writ of Habeas Corpus on remand appears in *United States ex rel Veal* v. *DeRobertis* (1984), 586 F. Supp. 19. The order of the Seventh Circuit Court of Appeals affirming the District Court's denial of the Petition for Writ of Habeas Corpus is unpublished and reported at 767 F.2d 926. A copy of this order appears in Appendix A. attached hereto. The order of the Seventh Circuit denying the Petition for Rehearing and Suggestions for Rehearing *En Banc* is unreported and appears in Appendix B attached hereto.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 17, 1985. Petitioner filed a Petition for Rehearing with *en banc* suggestions, which was denied in an order entered July 31, 1985. This petition is filed within ninety (90) days of said ruling of the United States Court of Appeals for the Seventh Circuit and jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner and a co-defendant were tried in 1971 for the murder of two Chicago Policemen. At the trial, petitioner sought to call four alibi witnesses, but declined to identify the witnesses prior to their taking the stand claiming the witnesses' professed fear of police harassment. At the time of petitioner's trial, the Illinois Notice-Of-Alibi Statute (Illinois Revised Statutes, 1969, Chapter 38, Section 111-14) required that a defendant who wished to call alibi witnesses notify the State of the names and addresses of the alibi witnesses not less than ten days prior to trial.[1] Overruling petitioner's repeated and specific objection that the Illinois Statute was unconstitutional under the Sixth Amendment's compulsory process guarantee, the trial judge refused to permit the alibi witnesses to testify and petitioner was convicted; his conviction was affirmed on appeal, *People* v. *Veal* (1978), 58 Ill. App.3d 938, 374 N.E.2d 963; and certiorari was denied. *Veal* v. *Illinois* (1979), 441 U.S. 908. Petitioner then filed a Petition for Writ of Habeas Corpus in the United States District

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[1] Some three years after petitioner's trial and pursuant to this court's decision in *Wardius* v. *Oregon* (1973), 412 U.S. 470, the Illinois Supreme Court held this statute unconstitutional under the Due Process Clause of the Fourteenth Amendment. *People* v. *Fields* (1974), 59 Ill.2d 516. The Seventh Circuit Court of Appeals held *Wardius* should be applied retroactively. *United States ex rel Hairston* (1979), 597 F.2d 604, 609, as did the Illinois Appellate Court. *People* v. *Stinson* (1976), 37 Ill. App.3d 229.

Court for the Northern District of Illinois. The Respondent, State of Illinois, moved for summary judgment pursuant to Federal Rule 56 specifically contending that "there are no genuine issues as to any material fact." The District Court granted the writ holding that petitioner has been denied his Sixth Amendment guarantee to call witnesses in his favor. *United States ex rel Veal* v. *Wolff* (D.C. Ill., 1981), 529 F.Supp. 713. In its appeal to the United States Court of Appeals for the Seventh Circuit, [for the first time in ten years of litigation] the State of Illinois requested a hearing to determine the "existence" of the alibi witnesses. The United States Court of Appeals reversed holding that defense counsel had failed to make an adequate offer of proof under state law citing *Engle* v. *Isaac* (1982), 456 U.S. 107, and remanded the cause for an evidentiary hearing, stating that ". . . there can be no serious dispute that exclusion of these witnesses, if they in fact existed, resulted in substantial prejudice to Veal (citation). The crux of this issue is whether these witnesses existed." *United States ex rel Veal* v. *DeRobertis* (7 Cir., 1983), 693 F.2d 642, 650. On remand, the district judge referred the evidentiary hearing to a magistrate who, after hearing witnesses and receiving exhibits submitted her report which the district judge adopted. *United States ex rel Veal* v. *DeRobertis* (D.C. Ill., 1984), 586 F.Supp. 19. The district judge held that the evidence at the hearing established that the alibi witnesses existed and were available at trial, but that petitioner had not shown "good cause" for his failure to make an adequate offer of proof with respect to the witnesses because petitioner's concern for the witnesses' safety was unreasonable, and because petitioner's counsel did not consider "alternative means" of presenting the

testimony of the witnesses. The district judge denied the writ. Petitioner then appealed to the United States Court of Appeals for the Seventh Circuit which in an unpublished order adopted the opinion of the district judge. 767 F.2d 926 (Exhibit A). Petitioner's timely Petition for Rehearing was denied (Exhibit B) and it is from that decision that the instant Petition for Certiorari is filed.

REASONS FOR GRANTING THE WRIT

1.

THIS COURT SHOULD ADDRESS THE QUESTION TWICE DELIBERATELY LEFT OPEN BY THIS COURT: WHETHER A TRIAL COURT HAS THE POWER TO EXCLUDE ALIBI WITNESSES AS A SANCTION FOR FAILURE TO COMPLY WITH STATE DISCOVERY RULES AND/OR ORDERS.

In *Williams* v. *Florida* (1970), 399 U.S. 78, 83, n.14, and again in *Wardius* v. *Oregon* (1973), 412 U.S. 470, 472, n.4, this court specifically declined to decide whether a trial court may exclude alibi witnesses as a sanction for failure to comply with a notice-of-alibi statute's requirements. The constitutional ripeness of this question has been noted in the dissents from the denial of certiorari by Mr. Justice White (joined by Justices Brennan and Blackmun) in *Stallworth* v. *Detroit Board of Education* (1983), ... U.S. ....., 103 S.Ct. 2141, and again (joined by The Chief Justice and Justice Brennan) in *Smith* v. *Jago* (1985), ... U.S. ....., 105 S.Ct. 1777. The Fifth Circuit in *United States* v. *Davis* (1978), 603 F.2d 633, the Ninth Circuit in *Fendler* v. *Goldsmith* (1983), 717 F.2d 1552, as amended, 728 F.2d 1181 (1984), and the Second Circuit in *Ronson* v. *Commissioner of Corrections* (1979), 604 F.2d 176, have noted the existing infirmity. Here the issue is even more poignant because the very statute under which the district court found that the trial judge had precluded the alibi witnesses was itself subsequently declared unconstitutional under the Due Process Clause pursuant to *Wardius* v. *Oregon* (1973), 412 U.S. 470 in *People* v. *Fields* (1974), 59 Ill.2d 516.

2.

THE DECISIONS OF THE COURTS BELOW REJECTING PETITIONER'S CLAIMS ON THE BASIS OF AN ALLEGED STATE PROCEDURAL BAR WHICH DID NOT EXIST AT THE TIME OF PETITIONER'S TRIAL CONFLICT WITH THIS COURT'S DECISION IN REED v. ROSS (1984), 104 S.Ct. 2901.

At his trial, petitioner sought to call four alibi witnesses. Petitioner's counsel informed the trial judge that the witnesses were available but that the witnesses had all expressed a fear of police harassment if they were identified several days prior to testifying. Counsel contended that the Sixth Amendment's compulsory process clause guaranteed petitioner an unrestricted right to call witnesses in his behalf without prior identification. But the trial judge, relying upon the Illinois Notice-Of-Alibi Statute, sustained the prosecutors' objections to the witnesses' testimony. On habeas, the district judge granted the writ holding that petitioner's Sixth Amendment rights had been violated, 529 F.Supp. 713, but the Seventh Circuit reversed ordering an evidentiary hearing to determine whether, in fact, the witnesses had existed. 693 F.2d 642. After the evidentiary hearing the magistrate found (and the district judge adopted the finding) that the witnesses did exist. However, the district judge then held that although the petitioner had repeatedly and specifically objected to the trial judge's order of preclusion, petitioner's counsel had failed to make an adequate offer of proof by not identifying the witnesses or considering "alternative means" for their protection, and that this constituted a procedural default barring relief under *Engle* v. *Isaac* (1982), 456 U.S. 107, absent a showing of "cause." Though recognizing that "the witnesses were aware of the tension

and hostility between the Chicago Police Force and the Black community, stemming from various clashes between the two groups and exacerbated by the slaying of the police officers, the offenses with which (petitioner) was charged", 586 F.Supp. at 20-21, the district judge adopted the magistrate's conclusion that petitioner's counsel's expressed fear of police harassment was unreasonable, and that therefore "cause" had not been shown. On appeal, the Seventh Circuit merely adopted the district judge's opinion. (Appendix A)

The courts below erred. Whatever the status of Illinois law today,[2] there existed at the time of petitioner's 1971 trial not one authority in the annals of Illinois jurisprudence requiring an offer of proof as a predicate to preserving for review the refusal to permit defense witnesses to testify. But assuming that the Sixth Amendment would countenance such a construction on the guarantee of compulsory process, the total absence of any authority in 1971 mandating such a requirement is so "novel" in the *Reed* v. *Ross* (1984), 104 S.Ct. 2901, sense as to itself constitute "cause" under *Engle* v. *Isaac* (1982), 456 U.S. 107, for petitioner's counsel's declination to identify the witnesses prior to their taking the stand. And even had Illinois had such a requirement in 1971, it is questionable whether such a rule could supersede the Sixth Amendment guarantee of compulsory process.

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[2] Judge Swygert has written that there is no offer of proof requirement under Illinois law. *Parisie* v. *Greer* (7 Cir., 1983), 705 F.2d 882, at 900. Recently the Illinois Supreme Court agreed in *People* v. *Lynch* (1984), 104 Ill. 2d 194, citing a 1914 case for the proposition that "the proponent need not make a formal offer . . . unless the trial court asks for one." 104 Ill.2d at 202.

CONCLUSION

For the foregoing reasons, petitioner, Johnny Veal, respectfully prays this Honorable Court issue its writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued April 22, 1985)

June 17, 1985.

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. William H. Timbers, Senior Circuit Judge*

UNITED STATES OF AMERICA ex rel.
JOHNNY VEAL,

Petitioner-Appellant,

No. 84-1826 vs.

RICHARD DeROBERTIS, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 80 C 128
Marvin E. Aspen, *Judge.*

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* The Honorable William H. Timbers, Senior Circuit Judge for the United States Court of Appeals for the Second Circuit, is sitting by designation.

ORDER

Petitioner Johnny Veal appeals from the district court's denial of his petition for a writ of habeas corpus. The district court held that although petitioner's constitutional rights were violated when he was prevented from presenting alibi witnesses at his state murder trial, he was not entitled to habeas relief because he did not show good cause for failing to make an adequate offer of proof at trial. *United States ex rel. Veal* v. *DeRobertis,* 586 F. Supp. 19, 21 (N.D. Ill. 1984). On appeal, petitioner merely attempts to reargue issues that were considered and decided by the district court, the state appellate court, and our previous opinion in *United States ex rel. Veal* v. *DeRobertis,* 693 F.2d 642 (7th Cir. 1982). Our review of the record, the previous opinions of this case, the parties' briefs, and oral argument leads us to conclude that petitioner's arguments on appeal are without merit. We therefore affirm the denial of petitioner's writ of habeas corpus and adopt the district court's memorandum opinion, reported at *United States ex rel. Veal* v. *DeRobertis,* 586 F. Supp. 19 (N.D. Ill. 1984).[1]

So ordered.

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[1] The facts of this case are fully set out in the state appellate court's opinion, *People* v. *Veal,* 58 Ill. App. 3d 938, 374 N.E.2d 963 (1978), the district court's first opinion, *United States ex rel. Veal* v. *Wolff,* 529 F. Supp. 713 (N.D. Ill. 1981), and our previous opinion reversing and remanding that decision, *United States ex rel. Veal* v. *DeRobertis,* 693 F.2d 642 (7th Cir. 1982).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 31, 1985.

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. William H. Timbers, Senior Circuit Judge*

UNITED STATES OF AMERICA ex rel.
JOHNNY VEAL,

No. 84-1826 vs.

RICHARD DeROBERTIS, Warden,

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 80 C 128
Marvin E. Aspen, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by attorneys for petitioner-appellant Johnny Veal, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William H. Timbers, Senior Circuit Judge for the United States Court of Appeals for the Second Circuit, is sitting by designation.